

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DOUGLAS EARL MEYER,

Plaintiff,

V.

MICHAEL WILSON.

Defendant.

No. CV-11-5138-RHW

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

Before the Court are Plaintiff's Motion for Summary Judgment and Motion to Strike, ECF Nos. 36, 51. In the first motion, Plaintiff moves for summary judgment arguing that Defendant's conduct violated his Fourth Amendment rights during an illegal search and seizure of his home that occurred on October 20, 2009.¹ Plaintiff submitted a Memorandum in Support, ECF No. 39, and a Statement of Undisputed Facts in Support, ECF No. 40. In response, Defendants submitted a Memorandum in Opposition, ECF No. 43, Objections and Statement of Facts in Opposition, ECF No. 44, and a Declaration of Michael Wilson with two exhibits attached, ECF No. 45. Plaintiff has also replied, ECF No. 50.

In his second motion, Plaintiff moves to strike the Defendant's Answer, Defenses, and Affirmative Defenses to Plaintiff's Third Amended Complaint, ECF No. 49, pursuant to FED R. CIV. P. 12(f). In opposition to the motion to strike, Defendant has responded, ECF No. 52. These motions were heard without oral

¹ For a detailed account of the facts in this case, See ECF No. 25 at 1-4.

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND MOTION TO STRIKE * 1**

1 argument. The Court is fully informed, having reviewed all documents in support
 2 of, and in opposition to, the motions. Based on the reasons set forth below, the
 3 instant motions are denied.

4 **PROCEDURAL BACKGROUND**

5 On October 3, 2011, Plaintiff filed a § 1983 action against Defendants
 6 Michael Wilson and Dan McCary. ECF Nos. 1, 4. Plaintiff asserted that his
 7 Constitutional rights were violated by (1) illegal police public disclosure; (2)
 8 illegal search and seizure (3) illegal incarceration, and (4) conspiracy to violate his
 9 constitutional rights and deny him his right to seek legal redress. *Id.*

10 On August 21, 2012, the Court granted, in part, Defendant's Motion to
 11 Dismiss. *See* ECF No. 25. The Court found Count Two stated a claim for illegal
 12 search and seizure, but Counts One, Three, and Four failed to state a claim, and
 13 were dismissed. In his Third Amended Complaint, ECF No. 31, filed on September
 14 26, 2012, Plaintiff amended the conspiracy claim alleged in the prior complaint, as
 15 permitted by the Court. On January 17, 2013, however, the Court granted
 16 Defendant's motion to dismiss this claim as well, and dismissed Defendant
 17 McCary. ECF No. 48. Plaintiff now moves the court for summary judgment as to
 18 his second claim, for unreasonable search and seizure, and to strike Defendant's
 19 Answer to the Third Amended Complaint, ECF No. 31.

20 **I. LEGAL STANDARD**

21 **A. Summary Judgment**

22 Summary judgment is appropriate when the moving party demonstrates
 23 there are no genuine issues as to any material fact. FED. R. CIV. PRO. 56(c). The
 24 moving party must first inform the court of the basis for its motion and identify the
 25 portions of the affidavits, pleadings, and discovery that demonstrate an absence of
 26 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
 27 (1986). A fact is "material" if it might affect the outcome of the suit under the

28 **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE * 2**

1 governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
 2 A dispute is “genuine” as to a material fact if there is sufficient evidence for a
 3 reasonable jury to return a verdict for the non-moving party. *Id.* at 248. If the
 4 moving party meets its initial burden, the “burden then shifts to the nonmoving
 5 party to establish, beyond the pleadings, that there is a genuine issue for trial.”
 6 *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). When
 7 considering a motion for summary judgment, a court may neither weigh the
 8 evidence nor assess credibility; instead, “the evidence of the non-movant is to be
 9 believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477
 10 U.S. at 255.

11 **B. Motion to Strike**

12 Rule 12(f) provides that a federal court may strike from the pleadings any
 13 insufficient defense or any redundant, immaterial, impertinent, or scandalous
 14 matter. FED. R. CIV. P. 12(f). The function of a motion to strike is to avoid the
 15 unnecessary expenditures that arise throughout litigation by dispensing of any
 16 spurious issues prior to trial. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880,
 17 885 (9th Cir. 1983). Rule 12(f) motions “are generally regarded with disfavor
 18 because of the limited importance of pleading in federal practice, and because they
 19 are often used as a delaying tactic.” *Neilson v. Union Bank of Cal., N.A.*, 290 F.
 20 Supp. 2d 1101, 1152 (C.D. Cal. 2003). Thus, courts generally grant a motion to
 21 strike only where “it is clear that the matter to be stricken could have no possible
 22 bearing on the subject matter of the litigation.” *LeDuc v. Kentucky Cent. Life Ins.*
 23 *Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992).

24 **II. DISCUSSION**

25 **A. Plaintiff’s Motion for Summary Judgment**

26 In a summary judgment motion, the moving party has the initial burden of
 27 showing the absence of a genuine issue of fact for trial. *Celotex*, 477 U.S. at 325.

28 **ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
 AND MOTION TO STRIKE * 3**

1 This motion must be supported with citations to the record. FED. R. CIV. P.
 2 56(c)(1)(A). If citing to affidavits, it must “be made on personal knowledge, set out
 3 facts that would be admissible in evidence, and show that the affiant or declarant is
 4 competent to testify on the matters stated.” FED. R. CIV. P. 56(c)(4). A written,
 5 unsworn statement may substitute for an affidavit if it is subscribed as true under
 6 penalty of perjury. *See* Advisory Committee Note on 2010 Amendment to
 7 subdivision (c) of Rule 56.

8 “A district court does not have a duty to search for evidence that would
 9 create a factual dispute.” *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007)
 10 (*citing Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)). As
 11 the Ninth Circuit recognized, it would be “unfair” to the district court to require it
 12 “to search the entire record” if a party fails to “disclose where in the record the
 13 evidence for [the factual claims] can be found”. *Id.* If a party fails to meet its initial
 14 responsibility of informing the district court of the basis for its motion and
 15 establishing the absence of genuine issues of material facts, summary judgment
 16 must be denied. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970) (*citing*
 17 Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56).

18 **1. Plaintiff’s Evidentiary Support**

19 At this point in the proceedings, Plaintiff cannot rely solely upon the
 20 allegations contained in his motion for summary judgment. *See Rivera v. National*
21 R.R. Passenger Corp., 331 F.3d 1074, 1079 (9th Cir. 2003) (noting that conclusory
 22 allegations made in the complaint and in declarations unsupported by independent
 23 evidence cannot create genuine issues of material fact).

24 To support his motion, Plaintiff submits a “Statement of Undisputed Facts in
 25 Support of Motion for Summary Judgment.” ECF No. 40. This Statement is
 26 simply a collection of factual assertions made by Plaintiff from his personal
 27 knowledge. It is not a formal affidavit or declaration. Nor is it an unsworn

28 **ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
 AND MOTION TO STRIKE * 4**

1 document that has been subscribed as true under the penalty of perjury. Thus, this
 2 statement is not admissible as evidence and may not be used to support the
 3 summary judgment motion.

4 Plaintiff's only admissible evidence in support of his motion is the
 5 "Declaration of Tammy Lee Rose in Support of Motion to Suppress," filed
 6 originally in Benton County Superior Court on November 30, 2010. *See* ECF No.
 7 4, App. F. This declaration was attached to Plaintiff's original complaint and
 8 labeled "Appendix F". *Id.* Although the Declaration may meet the technical
 9 requirements under Rule 56, it is questionable whether Plaintiff's passing
 10 references are sufficient to even meet the moving party's initial burden to present
 11 evidence of an absence of material fact. It is not for the court to search for the
 12 evidence; it should be presented to the court along with the relevant motion.
 13 Because Plaintiff failed to support his motion with admissible evidence, he has
 14 failed to meet the initial burden showing an absence of material fact and the
 15 motion is denied on this basis.

16 However, assuming arguendo that Plaintiff met his initial burden, the Court
 17 denies the instant motion on an alternative basis as well. Defendant has
 18 demonstrated genuine issues of material fact regarding consent that await
 19 resolution at trial. This issue is considered briefly below.

20 **2. Genuine Issues of Material Fact Remain Regarding Consent**

21 Plaintiff asserts in his "Memorandum in Support of Plaintiff's Motion for
 22 Summary Judgment," ECF No. 39, that Defendant Wilson bullied his way into
 23 Plaintiff's home. Plaintiff claims this fact is undisputed, based on the current
 24 record, and moves for summary judgment on the issue of qualified immunity
 25 regarding Defendant Wilson.

26 ///

27

28 **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
 AND MOTION TO STRIKE * 5**

1 In response, Defendant submitted a “Memorandum in Opposition to
 2 Summary Judgment,” ECF No. 43, along with the “Declaration of Michael Wilson
 3 in Support of Defendants’ Memorandum in Opposition to Plaintiff’s Motion for
 4 Summary Judgment,” ECF No. 45. Defendant Wilson declares under penalty of
 5 perjury that Plaintiff’s roommate, Ms. Rose, invited him into the home to look for
 6 the Plaintiff and at no time did he bully her into permission to enter the home. ECF
 7 No. 45 at 1-3. Whether Ms. Rose invited Defendant into her home, or whether he
 8 pressured her, as she claims in her Declaration dated Nov. 30, 2010, ECF No. 4, is
 9 a fact still unresolved. Further, this is a material fact that directly affects the
 10 outcome of Plaintiff’s remaining Fourth Amendment claim, because resolution of
 11 the issue turns on whether there was valid, uncoerced, consent. *See, e.g., United*
 12 *States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997).

13 Moreover, in a summary judgment motion, all conflicts of testimony are
 14 resolved in favor of the nonmoving party. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S.
 15 871, 888 (1990) (noting “where the facts specifically averred by [the nonmoving
 16 party] contradict facts specifically averred by the movant, the motion must be
 17 denied”). For the purposes of this motion, the Court must take Defendant’s sworn
 18 statement that he was invited into the home as true. Consequently, a jury could find
 19 in Defendant’s favor and that consent was freely given. Since Defendant has
 20 produced sufficient evidence contradicting Plaintiff’s evidence, there remain issues
 21 of material fact to be resolved at trial. Summary judgment is not proper.

22 Finally, Plaintiff contends that the search was invalid because Defendant
 23 Wilson failed to provide the necessary constitutional warning (the Court assumes
 24 this references a *Ferrier*² warning). ECF No. 39. Plaintiff asserts this is an
 25 undisputed fact and, thus, summary judgment is proper. Regardless of the veracity
 26 of that fact, Defendants correctly argue that whether consent was voluntary or the

27 ² *See State v. Ferrier*, 136 Wn.2d 103 (1998).

28 **ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
 AND MOTION TO STRIKE * 6**

1 product of duress is to be determined from the totality of all the circumstances
 2 citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 277. A warning under *Ferrier* is
 3 only one of the factors for a jury to consider in determining whether a search was
 4 voluntary or the product of duress or coercion -- and in no way would be
 5 dispositive of this case.

6 Even if Plaintiff had supported his motion with admissible evidence on this
 7 issue, the motion would still be denied as genuine issues of material fact remain to
 8 be tried in this case. Therefore, summary judgment is not proper.

9 **3. Qualified Immunity**

10 The Court also notes that the issue of whether Defendant is entitled to
 11 qualified immunity was first presented by Plaintiff in his "Memorandum in
 12 Support of Plaintiff's Motion for Summary Judgment." ECF No. 39 at 7-10. The
 13 Plaintiff also included argument regarding this issue in his Reply. *See* ECF No. 50
 14 at 7-10. Plaintiff asks the Court to grant summary judgment and hold that
 15 Defendant is not entitled to a qualified immunity defense. The Court declines to do
 16 so. Any discussion of this issue by Plaintiff before Defendant has briefed this issue
 17 is premature, and will not be considered herein. Instead, the Court will wait for
 18 Defendant's own motion for summary judgment, which has yet to be filed.

19 **B. Plaintiff's Motion to Strike**

20 Plaintiff also moves the Court to strike Defendant's Answer to the Third
 21 Amended Complaint under Rule 12(f). ECF No. 51. Specifically, he contends that
 22 Defendant's arguments are redundant. *Id.* at 1. After reviewing Defendant's
 23 Answer, Defenses, and Affirmative Defenses to Plaintiff's Third Amended
 24 Complaint, ECF No. 49, the Court is unable to find any insufficiently pled
 25 defenses or any redundant, immaterial, or impertinent matter that would warrant
 26 striking the pleading. *See* FED R. CIV. P. 12(f).

27 ///

28 **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
 AND MOTION TO STRIKE * 7**

III. CONCLUSION

The Court denies Plaintiff's Motion for Summary Judgment, finding lack of evidentiary support and remaining genuine issues of material fact. Also, the Court declines to strike the Defendant's Answer to the Third Amended Complaint.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 36, is **DENIED**.
2. Plaintiff's Motion to Strike Answer to Amended Complaint, ECF No. 51, is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel and Plaintiff.

DATED this 12th day of February, 2013.

s/Robert H. Whaley
ROBERT H. WHALEY
Senior United States District Judge

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND MOTION TO STRIKE * 8**